

**Before the Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Rules and Policies Concerning)	MB Docket No. 04-256
Attribution of Joint Sales Agreements in)	
Local Television Markets)	

Directed to: The Commission

COMMENTS

Communications Corporation of America (“CCA”), by its attorneys, hereby respectfully submits its Comments in response to the Commission's *Notice of Proposed Rule Making* in MB Docket No. 04-256, FCC 04-256, released August 2, 2004 (“*NPRM*”). With respect thereto, the following is submitted:

1. CCA, through subsidiaries, is the licensee of eight television stations¹, all of which are located in small to medium-sized markets. The Nielsen market rankings for those stations range from Market 81 (Shreveport) to Market 158 (Odessa/Midland), with five stations in markets 93 through 100. In a number of those markets, CCA has entered into arrangements with other stations whereby CCA acquires and sells the local commercial inventory for another station in the market in return for a payment and certain accounting and administrative services. CCA is therefore familiar with the operations of agreements in the nature of joint sales agreements in small to mid-sized markets, along with the benefits and detriments associated with such

¹ These stations include KVEO(TV), Brownville, Texas; KPEJ(TV), Odessa, Texas; KWKT(TV), Waco, Texas; KMSS-TV, Shreveport, Louisiana; KYLE(TV), Bryan, Texas; WGMB(TV), Baton Rouge, Louisiana; KTSM-TV, El Paso, Texas; and WEVV(TV), Evansville, Indiana. In addition, an entity with some common ownership, Jackson Television, LLC, is the licensee of WDBD(TV), Jackson, Mississippi.

agreements.

2. In the *NPRM*, the Commission seeks comment on whether certain joint sales agreements (“JSA’s”) involving television stations should be found to create an attributable interest in the “brokered station” for the broker. A JSA is an agreement between the licensee of a station and another party (the “broker”), which provides for the broker to sell some or all of the advertising time for the station in return for either a fixed fee or a percentage of the revenues from the time sold. The Commission has concluded that radio JSA’s whereby the licensee of one station in a market brokers more than 15 percent of the weekly advertising time of another station in the same market should be found to create an attributable interest in the brokered station. 47 C.F.R. §73.3555, Note 2(k).

3. In so doing, the Commission noted that an attributable interest is one which, while less than controlling, makes the holder likely to urge a licensee to take actions to protect the interests of this holder, and where there is a realistic possibility that such persuasion will affect a station’s programming and other core operational decisions. *In the Matter of 2002 Biennial Regulatory Review*, 18 FCC Rcd 13620, 13743-44 (2003), *affirmed in part, remanded in part, Prometheus Radio Project v. F.C.C.*, 373 F.3d 372 (3rd Cir. 2004). The Commission further found that because the broker controls the advertising revenue of the brokered station, a JSA has the potential to convey influence over programming and core operations of the station to warrant attribution. The Commission now is questioning whether it should reach the same conclusion with regard to television JSA’s.

4. CCA would urge the Commission not to adopt the same rules for television JSA’s that it has adopted for radio JSA’s. The Commission’s assumptions about the operations of stations

subject to JSA's and the incentives of the licensee of a brokered station are fundamentally flawed. Further, whatever the merits of finding certain radio JSA's to create an attributable interest, there are sufficient differences in the fundamental methods of operating television as opposed to radio stations to merit different treatment of these services. In addition, television JSA's have positive benefits for the viability of new or weaker stations in a market that more than outweigh any slight harm that JSA's may cause to the level of competition in a market.

5. It is generally accepted that programming is the very essence of broadcasting. Indeed, the Commission singled out the ability to affect programming as a key factor in determining attribution status, as it noted that attribution rules seek to identify those interests that confer on their holders a degree of "influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other core operating functions." *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry*, 14 FCC Rcd 12559 ¶ 1 (1999), *on recon.*, 16 FCC Rcd 1097 (2001). Thus, the Commission has highlighted programming above all other core functions of a station as a matter of concern.

6. JSA's by their very nature, however, do not directly involve programming. In CCA's experience, it is the licensee that remains completely in control of all programming decisions, including the selection, acquisition, scheduling and payment for such programming. Further station personnel and payment decisions remain firmly within the province of the licensee. Even in cases in which some services are provided, those represent administrative functions carried out at the direction of the licensee for the convenience of the licensee, much as a company might hire

an outside accounting firm or office services support company.

7. Thus, it is not the case that a licensee that has entered into a JSA may simply sit back and be nothing more than an inactive monitor of its station. Such licensees retain programming obligations, such as entering into agreements to broadcast certain shows. It must be noted as well that the Commission's assumption that a licensee of a brokered station will have little incentive to see that the station airs quality and successful programming is not accurate. No matter whether a licensee is receiving a percentage of revenues or a flat fee, if the programming aired on the station does not attract a sufficiently sizable audience, the funds flowing to the station will dry up. If a broker cannot sell sufficient advertising time at a high enough rate to cover costs and return an acceptable profit, then the JSA will be cancelled in short order. Moreover, in addition to the other licensee functions related to the selection and purchase of programming, if the station is a network affiliate, it is also the licensee which must maintain that relationship with the network.

8. Indeed, one of the most striking differences between the operations of radio stations and those of television stations is the prevalence of network affiliations among television stations. For network affiliates, a large portion of each day, including a substantial percentage of the advertising time, is controlled by the network. The portions of time during which network programming is aired include those times when the most viewers are in the audience (*e.g.*, "primetime"). Thus, for network affiliates, the presence or absence of a JSA is of little import with regard to significant blocks of time each day.

9. In the case of a network affiliate, it is the network that chooses, produces, schedules, and provides programming to fill substantial parts of the broadcast day. The affiliate licensee has

little influence over the choice or content of particular programs or when they are shown, but only the right to pre-empt programs that it finds unsuitable for its audience. Further, if that right is exercised on more than a rare and exceptional basis, negative consequences for the licensee are likely to follow. Thus, networks clearly have substantial influence on the programming of their affiliates. Furthermore, the networks also generally retain the right to sell substantial portions, often in the range of approximately 50 to 80 percent, of the advertising time contained within network programs. This combination of providing a significant percentage of the programming, especially during the times most viewers are watching, and selling substantial amounts of commercial time within that programming is not considered as providing the network with an attributable interest in each of its affiliates, however.

10. The conclusion that this amount of control over a station's programming and commercial time does not create an attributable interest is clearly inconsistent with the finding that an attributable interest is created when a broker in a JSA might be able to exercise some amount of influence over the remaining programming, which is limited in both quantity and audience reach. The Commission is focusing only on possible horizontal influence and does not examine at all the question of vertical influence exercised by networks or national sales representation firms. While CCA certainly does not advocate attributing interests in each network affiliate to that network, this inconsistency militates against attribution of television JSA's.

11. A similar analysis also applies to consideration of the relationships between stations and national representation firms. Like brokers in a JSA, the national representation firm sells advertising on behalf of stations subject only to commercial acceptance policies of the station. For network affiliates, the amount sold often amounts to as much as 50 percent of non-network

commercial time. In addition, not only is the fee paid pursuant to an agreement with a national representative often affected by the amount of business generated (thereby creating a financial link), but the representation firm generally maintains a programming department which researches programming and may provide advice to stations with which it has agreements. Nonetheless, this relationship does not, and should not, create an attributable interest for the national representation firm. These examples indicate graphically that the Commission must carefully weigh the possible unintended consequences that determining that JSA's create an attributable interest will have on other rules and business relationships.

12. Furthermore, in looking at the horizontal relationship, it is not clear why holding an interest in another station in the same market would necessarily affect a broker's ability or incentives to influence programming or other core operational matters. In either case, the broker has an incentive to sell commercial time as profitably as possible for the brokered station. If it is the broker that is to realize any profit above a set fee, then it has every incentive to want the brokered station to succeed as well as any station that it may own in the market. The incentive to achieve success does not change in either case. Likewise, if that incentive structure conveys the ability to influence programming choices, that influence would be present regardless of whether a broker has another station in the market; either way, the broker will wish to realize as much profit as possible from the brokered station.

13. The Commission has indicated that another reason for treating certain television JSA's as attributable interests is due to concerns about competition in local markets. Far outweighing any such concerns, however, are the substantial benefits, including competitive benefits, that JSA's have provided and can continue to provide in local markets. In particular,

JSA's can help to keep new and/or less dominant stations in a market afloat financially. Keeping financially shaky stations operating obviously helps to increase the level of competition of both viewpoints and advertising outlets in the marketplace.

14. In this regard, it should be noted that many JSA's involve two stations with differing network affiliations and therefore substantially different programming. As a result, that programming is likely to appeal to disparate demographic groups and therefore to attract varying groups of advertisers. Therefore, any negative impact on competition in a market is likely to be limited, and indeed, having a strong seller to offer advertising opportunities to reach a wide range of demographic groups can increase competition in a market.

15. Furthermore, competition also can be promoted by providing weaker or new stations with a steady and known income stream. The less dominant station then can go into the market to purchase the best programming and hire personnel based upon the knowledge that it will have a certain amount of funds coming in. In contrast, the normal ebbs and flows of income typical with start-up or less competitive stations make it hard for licensees to make firm plans or contract for programming confidently. With the better programming and personnel made possible by the JSA, the weaker station can then develop into a stronger competitor better able to attract both viewers and, as a result, advertisers.

16. JSA's can also enhance competition in the local advertising market by allowing two less competitive stations to combine to provide more robust competition to a stronger station in the market. In many instances, particularly in small markets, there are one or two dominant stations that enjoy a disproportionate share of the advertising revenues. Such stations, because of their dominance, are then in a position to wield a considerable amount of control in the local

television advertising marketplace, and smaller stations on their own cannot compete effectively. In contrast, if two of those weaker stations can sell advertising together, the combination is therefore able to mount a more substantial challenge and can provide a more attractive outlet for advertisers. As a result, the level of actual competition in the advertising market rises.

17. Furthermore, the reality of the television marketplace is that television stations in a market face substantial competition in the local market not only from other local television broadcast stations but also from other sources based outside the market. This reality further distinguishes the television from the radio advertising market. Unlike radio stations, local television stations must compete against not only other local stations but also well-established multi-channel video providers (“MVPD’s”), including cable television and DBS companies. Thus, the realities of the competitive marketplace are quite different for local television stations than for local radio stations. While radio is beginning to face some competition from satellite radio, that service is now primarily national rather than local in focus, is precluded from offering local advertising that is not broadcast nationally, and reaches only a small percentage of radio listeners. In contrast, advertisers wishing to reach television viewers have a vast array of channels carried on MVPD’s with which they may place their commercial announcements. Local advertisers, which at one time were limited to placing commercial spots on broadcast stations, can now place local spots on virtually any cablecast program, even purely national ones, through local availabilities inserted by MVPDs. Viewer choices and, therefore, advertiser choices, are enormous. This level of competition leaves many weaker and new television stations in a precarious financial condition. By providing weaker stations with financial stability, those stations are allowed to develop and become stronger and more established. As a result, the

level of competition can actually be increased rather than decreased by television JSA's.

18. In light of the many other choices afforded local television viewers and advertisers, even if the Commission should decide to find certain television JSA's to constitute attributable interests, currently existing television JSA's should be grandfathered. To do otherwise would severely disrupt the competitive marketplace. Moreover, such actions could spell disaster for weaker stations suddenly forced to go it on their own with uncertain finances. As a result, a number of less competitive stations in small to mid-sized markets would be likely to be forced to go silent. This stilling of a broadcast voice clearly would not promote any competitive interests, whether of differing viewpoints or advertising outlets.

19. In sum, for the reasons stated herein, CCA urges the Commission to refrain from determining that certain television JSA's constitute attributable interests and, in the alternative, should the Commission decide to find JSA's to confer an attributable interest, to grandfather JSA's that are currently in place.

Respectfully submitted,

COMMUNICATIONS CORPORATION
OF AMERICA

By: /s/ Anne Goodwin Crump
Vincent J. Curtis, Jr.
Anne Goodwin Crump

Its Attorneys

FLETCHER, HEALD & HILDRETH, P.L.C.
1300 N. 17th Street
Eleventh Floor
Arlington, Virginia 22209
(703) 812-0400

October 27, 2004